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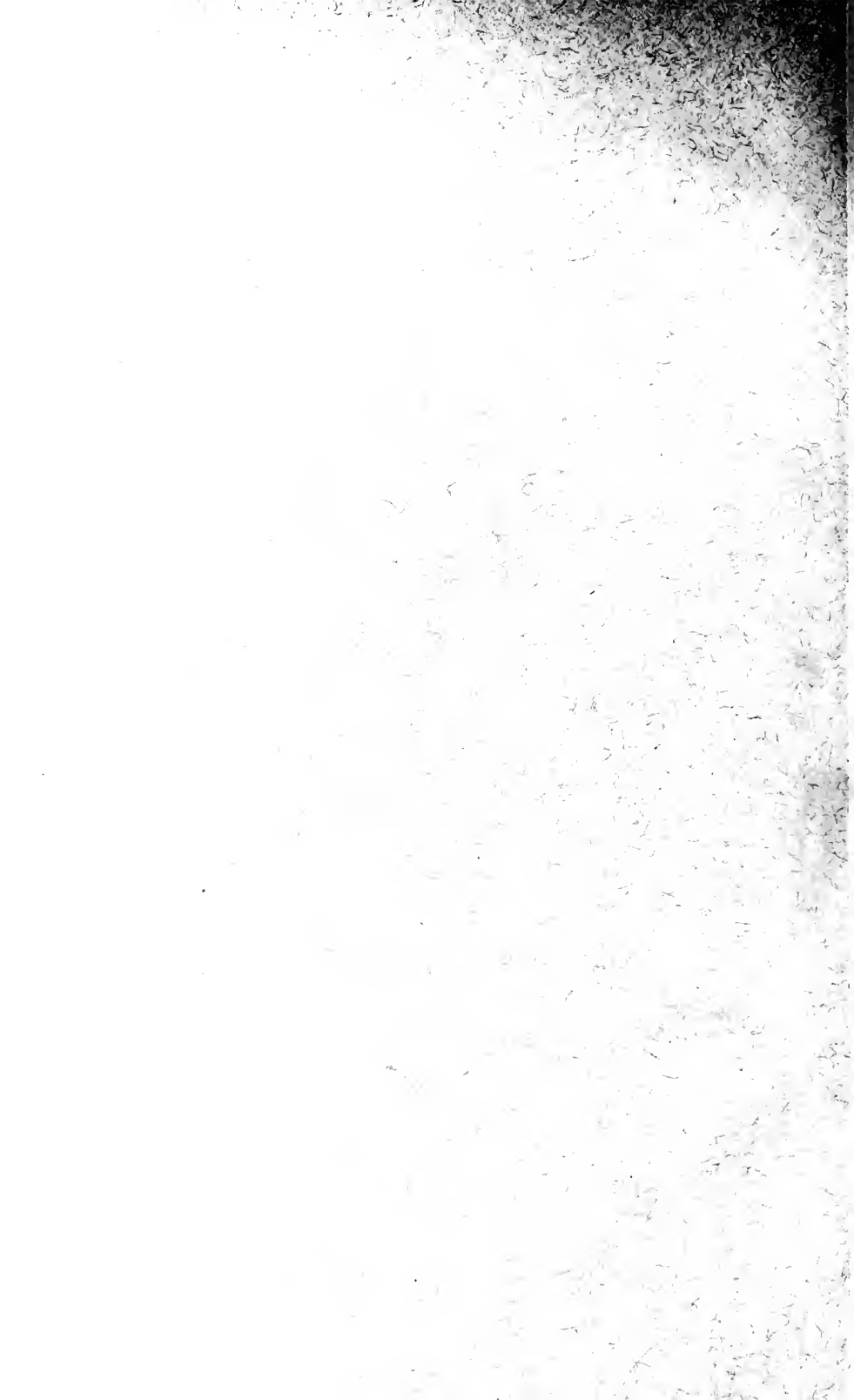
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HYPNOTISM AND ITS LEGAL IMPORT

By GURSTON S. ALLEN

Reprinted from THE CANADIAN BAR REVIEW



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*PART I.

FOREWORD.

Our legal edifice has been erected for the purpose of regulating the relationships of individuals *inter se* so that the general structure of society may be the better protected. Therefore in considering such relationships it is primarily essential that we appreciate the makeup of the personality of the individuals who compose society, so that we can understand personality in action, namely conduct, in whatever aspect it may present itself. The conduct of an individual will thus be a unity that can be fitted into our social environment. I suggest that we must first understand psychology (the study of reactions) and use that understanding to interpret situations which arise, having regard to their effect on our social context. If this is done, we are in a position, knowing and being in contact with the fundamental principles governing human behaviour, to administer Law; thus we are not giving a narrow interpretation to Law, but are embodying it in one that is closely connected with it, namely the psychological. This treatise is offered in the hope that it will present some essential facts concerning human nature and the possibilities of human conduct.

The average man is repelled by the word hypnotism, and for a very simple reason; he associates it with a grotesque stage character like Svengali, or with some mountebank who possesses a power that is dangerous and wicked. Such a reaction can only be explained on the ground that the subject has not been given the serious attention that it deserves. From the legal viewpoint, however, a phenomenon such as would present the commission of a crime by a person while in the hypnotic state, should be examined; for if such a situation could arise, the law must be in a position, at least theoretically, to deal with the problem.

The history of hypnotism, although interesting, does not particularly concern us. Suffice it to say that from time immemorial man has possessed the power to relieve or cure disease by firmly

*From Canadian Bar Review, Vol. XII, page 14.

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implanting in the patient's mind the belief that he is, or soon will be cured. However it is to Dr. Liébault, of Nancy, that we must give credit for the present world wide interest in hypnotism. Although Dr. Braid of Manchester before him had stumbled upon the plain truth that suggestion is the determining factor in exciting the phenomena of hypnosis, it is to Liébault that credit must be given for demonstrating beyond doubt that suggestion, direct or indirect, is the one factor in the production of the phenomena. Hippolyte Bernheim, Liébault's most famous pupil, did much to clarify the problems of hypnotism, more particularly because he could reduce the results of his experiments to the simple caption "there is no hypnotism, there is only suggestion." As a result of the contributions of these men, hypnotism thus becomes merely the induction of a peculiar psychical condition which increases the susceptibility to suggestion. (Bernheim—"Suggestive Therapeutics").

Susceptibility to suggestion exists in the waking condition, but it is then either neutralized or restrained by the faculties of reason, attention, and judgment. In spontaneous or in induced sleep (hypnosis) these faculties are dulled and weakened, and imagination rules supreme.¹ If a subject is told that he is a dog, he will immediately act the part suggested. He may be thrown into a state of intoxication by being caused to drink a glass of water under the impression that it is brandy; or he may be restored to sobriety by the administration of brandy under the guise of an antidote to drunkenness. A hypnotized person may be made to drink bitter quinine, salt water, raspberry juice and chocolate within a few minutes in successive sips from one and the same glass of water; but one doesn't even require the glass. The statement that he has a glass containing the named drink in his hand suffices.²

It then comes down to this—the hypnotic condition is not an abnormal one. It does not develop new functions nor extraordinary phenomena, but it develops those which are produced in the waking state; because of a new psychical modality, it excites the normal susceptibility to suggestion which we all possess to some extent, and our psychical condition is modified so as to carry out the images and impressions evoked with greater boldness and distinctness.³

Liébault and Bernheim explain that hypnotism is nothing but suggestion. But, as Professor Sidis pointed out, "If hypnotism be nothing but suggestion, by what is it induced? Why, by suggestion. Suggestion is thus its own cause." However the increase of sugges-

¹ Bernheim, p. 132.

² Hudson, *Law of Psychic Phenomena*, p. 30.

³ Bernheim, p. 149.

tibility is merely one of the characteristics of a new psychical condition which must be accounted for just as much as the effects of the suggestion which this, and this alone, renders possible.⁴ It was not known how to explain the mental processes involved therein, until Professor Meyers of Cambridge offered his working hypothesis. His theory, given tentatively, was that:—taking consciousness as a hypothetical level, or limen, man possessed a supra-liminal or sub-conscious intelligence.⁵ That is to say, man has, or appears to have, two minds, each endowed with separate and distinct powers and aptitudes; each capable under circumstances of independent action. It seems a matter of indifference whether we consider that man is endowed with two distinct minds, or that his one mind possesses certain attributes and powers under some conditions, and certain attributes and powers under other conditions. It is sufficient to know that everything happens just as though he were endowed with a dual mental organization. To put it simply, the mind must be regarded as dual in character—one part of it is conscious and the other part is subconscious. The conscious mind, or man in his normal condition, is not controllable by the suggestions of another against reason. The subconscious mind, or man in the hypnotic state, is constantly amenable to the power of suggestion. Simply defined then, mental suggestion means that we take advantage of the fact that when the conscious or critical part of the mind is at rest the deeper parts of the mind are very susceptible to suggestion.⁶

There are certain general phenomena of hypnosis that we should strive to understand, and we can best start with an examination of the problem as to who can be hypnotized. Doctors have hypnotized between 80 and 96 per cent. of their patients depending on their own experience, and Professor Baudouin of Geneva even claims that 98 per cent. of the people are susceptible.⁷ It is a mistake to think that the disposition to hypnosis is a sign of weakness of will, but, on the other hand, the ability to direct one's thoughts in any particular direction is very favourable. Those who can by no possibility fix their attention and who suffer from continual absence of mind can hardly be hypnotized at all.⁸ It more or less comes down to the fact that every person is susceptible. Bernheim rightly said, "everything depends on the right inspiration; one has only to discover the right key in order to set every individual suggestibility into action; that is, to awaken the suggestibility."

⁴ Wingfield, *Introduction To Hypnosis*, p. 6.

⁵ Davis, *Hypnotism and Treatment by Suggestion*, p. 31.

⁶ Hudson, p. 25.

⁷ Baudouin, *Suggestion and Auto-suggestion*, p. 228.

⁸ Moll, *Hypnotism*, 1909 ed., p. 50.

It is generally admitted that a person cannot be hypnotized against his will, at all events at the first attempt. However, we must distinguish whether the subject complies with the prescribed conditions or whether he does not. If he does, for example if he sufficiently concentrates his attention, then hypnosis may be produced at the first attempt, even against the wish of the person experimented on.⁹ Dr. Schilder, of Vienna, disposes of this question by referring to the sleep wish. It is the instinctive, not the conscious sleep wish, that is the determining factor. To be sure, the conscious wish may intervene to retard or accelerate the work of hypnotisation, but in the long run the latter depends on the instinctive readiness for hypnosis. Similarly, it is impossible, by the use of the will alone, either to force sleep or prevent it from coming. Precisely in hypnosis it is frequently observed that an urgent instinctive desire for hypnosis is concealed under a superficial resistance, and that an eloquently delivered wish to be hypnotized is based upon a stubborn objection to entrust oneself to the hypnotizer.¹⁰ It is not to be doubted, however, that many people who have been frequently hypnotized can be re-hypnotized against their will and without internal compliance with the ordinary conditions, provided their suggestibility is strong enough. Moll relates an interesting example of this in the case of a girl who had been frequently hypnotized by loud noises, and who went to a drawer to abstract some photographs out of it. The casual beating of a gong threw her into a cataleptic state, so that she stood motionless in the act of carrying out her theft.¹¹

If a person could only be hypnotized with his consent, it would follow that every time he was in a state of hypnosis, he incurred *ipso facto* a certain responsibility to society, for having surrendered the conscious control of his will. If, however, a person could be hypnotized against his will, he would not incur such responsibility merely from the fact that he was in the state of hypnosis. It is important to understand this before we can really appreciate the relation of this part of the problem of hypnosis to crime.

Expressions of the will which spring from the individual character of the patient are of the deepest psychological interest; if the suggestion happens to run counter to some latent, but more powerful idea or suggestion already dominating the field, it may be refused. Habit and education play a large part here. Dr. Davis of Liverpool found that no matter how deep the somnambulism, if suggestions

⁹ Moll, p. 54.

¹⁰ Schilder and Kauders, Hypnosis, p. 24.

¹¹ Moll, p. 54.

were contrary to the moral tone or upbringing of the subject, they were rejected; one fact seemed to stand out—the hypnotic power is strictly defined and limited. He could induce his subjects to accept illogical premises and reason deductively and act as if the premises were true, but he failed when he took the same course with convictions.¹²

In some cases it is well to suggest a false premise directly resistance is offered to some suggestion. Liégeois' old case is still in point. A subject was to be induced to steal a watch. He refused, but when it was suggested to him that the watch was his own, and that he was only taking it back, he obeyed the command.

Generally, then, it is admitted that there are limits to what suggestions will be accepted; it is a fundamental error to believe that the hypnotized is under a complete dependence on the hypnotist. This dependence is a relative one, and is encumbered by all sorts of conditions. Suggestion means a sort of tournament between the dynamisms of two brains; the one gains the mastery over the other up to a certain point, but only under the condition that it deals adroitly and delicately with the other, that it stimulates and uses its inclinations skilfully, and above all things, that it does not make its dealings go against the grain.¹³ It seems that beyond the suggestive relation between the hypnotizer and the hypnotized there stands also an ego ideal which serves the ends of the total personality and exercises a continuous control over the relations between the suggester and the suggestee. The hypnotized is not merely a tool in the hands of the operator, but on the contrary his will is liable to manifest itself at odd and unexpected places, depending on the personality of the particular subject.¹⁴

We now approach the problem of amnesia—the fact that a number of hypnotized persons have no memory of the experiences passed through in hypnosis. As a rule, a person during the period of a deep veiling of consciousness is amnesic, but not always. One of the peculiarities in this connection is that the events which have transpired in a previous hypnosis, and which have not been remembered in the waking state, may only be remembered in a later hypnosis. Not only that, but certain events of the waking life which have been forgotten, are remembered in the hypnotic state. These two points will be well to bear in mind, because if a crime is committed in a state of deep hypnosis, this act may not be remembered in the normal state; the facts may only be brought to light by means of another hypnosis.

¹² Davis, p. 35.

¹³ Forel, p. 102.

¹⁴ Schilder, p. 33.

The post-hypnotic influences of suggestion belong to the most important phenomena of hypnotism. Everything which is produced in hypnosis itself can very frequently be called forth also in the waking condition by giving the suggestion to the hypnotized person during hypnosis that it will take place after he has awakened. If asked why he is doing the act, the subject will invent any excuse as justification for his conduct.

Now let us look at hallucination retroactive, or suggested falsification of memory. All of a sudden Professor Forel of Zurich said to a certain Miss X, just as a young man whom she had never seen before came in the room (she was awake at the time)—“You know this man. He stole your purse at the station a month ago and ran away with it, etc.” She looked at him, first somewhat surprised, but was soon convinced. She remembered it exactly and even added that there was a pound in the purse. If it is possible to successfully suggest amnesia to a person for a certain time past, then it is possible just as easily to suggest an artificial addition to his recollections, as long as the corresponding conceptions are brought into his brain. A small boy, aged eight years, brought before a meeting of the law society in Zurich, swore before God, in response to a suggestion, that one of the barristers present had stolen his pocket handkerchief a week previously. He added of his own account, when asked, the exact time and place. Five minutes later it was suggested to him that this had never taken place and that he had never said that it had. He denied with just as definite boldness on his oath the charge which he had just made a few minutes before.¹⁵

Bernheim has even conducted these retroactive suggestions collectively and has produced a number of false witnesses in this way, who gave their evidence with absolute conviction. He pointed out that it is particularly easy to produce such deceptions of memory during complete wakefulness by means of suggestion, especially on children, who are instinctively inclined to accept more or less everything which is told them by grown up people in decided tones. Such has been the case not infrequently in criminal proceedings. The ritual murder case that came before the court of Tisza-Ezlar, a Hungarian Town, on April 1st, 1882, is well known. Moritz Scharf, a child 14 years old, was led before the Judge; humble, debased in the eyes of the poor, among whom he had lived, he trembles before the personage representing force and justice. Alone, face to face with the commissioner, he is terrified. The commissioner persuades him that the Jews are an accursed race, who consider it a pious duty to spill Christian blood, and that this is not the first

¹⁵ Forel, p. 126.

of such trials in history. The imagination of the poor nervous child is impressed, and little by little the profound and persistent impression of his people murdering the little girl becomes an image. The child has seen! Retroactive hallucination has been created, and the memory of the fictitious vision is so vivid that the child cannot escape it. Eventually however we know that justice triumphed, and the boy's hallucinations were shown to have been merely the result of suggestion in the waking state.¹⁶

Psychoanalysis has revolutionised psychological thinking, and an appreciation of its teachings is absolutely necessary before we can discuss the relation of hypnotism to crime. In order to get the true idea of what the New Psychology stands for, we must try to understand the fundamental change that has been brought about within the whole realm of psychology by the discoveries of Freud of Vienna and Jung of Zurich. The magnitude of this change is only comparable to that wrought in the realm of Physical Science by the discoveries of Galileo and Darwin. It involves a complete recasting of the facts of mental life, and more important still, an entirely new conception of the operation of mental laws; the practical result on the lay public is that it finds itself called upon to-day to accept a new attitude to psychology, which in many cases involves a new adjustment to life and religion.¹⁷

Freud holds that a great part of mental life, perhaps the whole, can be summarised under two principles, which he terms the 'pleasure-principle' and the 'reality-principle', respectively. The former represents the primary original form of mental activity, and is characteristic of the earliest stages of human development; its main attributes are a tendency, on the one hand, to avoid pain and disagreeableness of whatever kind, and on the other a never ceasing demand for immediate gratification of various desires of a distinctly primitive and lowly order, and all this at literally no cost; it is, in other words, ruled entirely by the hedonic pleasure-principle. Soon however, this tendency comes into conflict with the 'reality-principle.' The function of the latter is to adapt the organism to the exigencies of reality, to subordinate the imperious demand for immediate gratification, and to replace this by a more distant but more permanently satisfactory one. It is thus influenced by social, ethical, and other external considerations that are ignored by the earlier principle.¹⁸ In other words it comes down to this—we are born with an 'I want', and are restrained by a 'You must not'.

¹⁶ Bernheim, p. 167.

¹⁷ Miller—*The New Psychology and The Parent*, p. 15.

¹⁸ Ernest Jones—*Papers on Psycho-analysis*, p. 3.

The fate of the pleasure-principle may be briefly indicated as follows: the primary tendencies comprising it are inhibited and even repressed (kept from consciousness) so that they can neither reach their own immediate aim nor even continue as conscious processes; henceforth they lead an underground life, their very existence unsuspected by the individual, and ever striving to an unattainable goal. Thus we have interpreted the great discoveries of Freud—the conception of mental conflict and our instinctive treatment of this by repression in the unconscious.

We are now in a position where we should glance at the instructive theory of dreams given us by Freud. In studying the dream structure, Freud played the part of Prometheus. He showed us the great part that symbolism plays in our dreams, and that there is a universal language of the dream which we must understand. Not only did he bring the light which illumines the dark recesses of the dream, but he also forced us to assume the responsibility for our dreams. So long as dreams are unmeaning froth, there was no need to trouble about them. Undoubtedly our responsibilities grow heavier when dreams are included within the domain of conscience; when we recognise that our dreams give expression to our evil impulses, to our protests against morality and civilization; and when the Delphic precept 'Know Thyself' undergoes so unexpected an extension. That is why Freud's discovery has been so unwelcome. The dead return and the dead thoughts of evil, the shapes that we would fain keep from the light of day, the thoughts that had been thrust down into the Tartarus of the unconscious. In our dreams we murder our nearest and dearest, we revel in perversions which horrify us in waking hours. All our criminal instincts are unchained in the dream. We are venturesome in dreams, for when we are locked in slumber we are not exposed to the dangers that would gather round us did we actually carry out all that we do imaginatively in dreams.

The ego which has discarded all ethical bonds feels itself at one with the demands of the sexual impulse, those which have long been condemned by our aesthetic training, and those which are contrary to all the restraints imposed by morality. The striving for pleasure, the libido, as we say, chooses its objects unchecked by any inhibition, preferring indeed, those which are forbidden; desires which we believe alien to human nature show themselves powerfully enough to give rise to dreams. Hate, too, rages unrestrainedly; wishes for revenge and death wishes against those who in life are nearest and dearest—parents, brothers and sisters, husband or wife—are by on means uncommon. Dreams had generally been thought to be a

meaningless conglomeration of psychical processes evoked by chance stimuli, but thus did Freud show that they are the disguised expression of highly significant underlying psychical processes.¹⁹

As we shall see, these observations on psychoanalysis will be very important when we come to examine the theory of crime to be hereinafter propounded. We have seen the result of the workings of the unconscious mind on the material of dreams; for the latter are almost completely the product of the unconscious mind, since during sleep the conscious has been dulled. Then appreciating the fact that hypnotism dulls the conscious and allows full swing to the unconscious mind, we shall realise that we are confronted with a real problem; in effect, when hypnotized, even as when asleep, we would be under the guidance of the pleasure-principle, as it were; we would be under the guidance of our instincts, unhampered by aesthetic or educative influences—and all this not through any direct fault of our own.

Then again, a good many people who submit themselves to hypnosis, possibly for therapeutic benefit to be derived therefrom, will be found to be suffering from mental disturbances caused by repressions, usually of a sexual nature. In which event, they will be most liable to succumb to a suggestion under the hypnotic spell at that point where such a suggestion comes in contact with their individual conflict. Even admitting the generally accepted theory that under hypnotic influence we will not carry out a suggestion contrary to our personality as a whole, we must not undervalue the part that the unconscious plays in the make up of that personality. Bearing this in mind, I should hesitate to call that person a criminal who had schooled his conscious self to be in perfect harmony with our criminal laws, but who gave vent to an opposing sleeping desire which a suggestion from a hypnotist had awakened. One must be lenient before condemning such a person, although the purpose of the hypnosis would have to be investigated to see whether there was any ulterior motive.

Not discussing the problem here as to whether our code of morality is natural or artificial, I think that there are bound to be times when our desires will be out of accord with prevailing convention; there are bound to be times when our unconscious wishes will not coincide exactly with what we have been taught to desire, and here it is, I maintain, that under hypnosis we shall be liable to accept a suggestion that will coincide with the unconscious wish that hypnosis has uncovered—and here it is that we shall be liable to commit certain 'crimes', if you will.

¹⁹ Wittels—Sigmund Freud, p. 61.

*PART II.

I think that we have now reached a point where we are sufficiently equipped to discuss the forensic aspects of hypnotism, and first of all we must mention the interesting fact that the disposition of certain persons, of allowing themselves to be very easily and one might say instinctively and unconsciously influenced by others without recourse to hypnotic procedure, is based on suggestion. This disposition is very highly developed in certain persons; they simply cannot resist suggestion, the influence of those who take an interest in them, and in consequence they become the playthings of other people, and are mostly misused. On the other hand, we meet with people who know how to subject others irresistibly to their influence. These are great natural hypnotists and they often abuse their gift if they are unscrupulous. An historical example of this is met with in the person of Napoleon I. These facts are absolutely identical with suggestion in the waking condition, and the relationship of this phenomenon to hypnotism will be well to bear in mind.²⁰

Let us first discuss crimes committed on hypnotized persons. I believe that a good many crimes may be committed on a hypnotized person, provided that a higher degree of hypnosis is attained, although I do not go all the way with Forel when he says that every conceivable crime may be committed under these circumstances.

A very important protection against this is found in the hypnotized himself. However tempting and easy a crime of this nature might be, the results of this for the hypnotist are very dangerous, for the whole structure on which he would build his security is a fragile one, which can be easily blown over. The hypnotized person sometimes awakens at a time when one least expects it. At times one thinks the subject is amnesic, and yet the recollection of it all suddenly returns to him by means of some autosuggestion or other. The subject can mostly be hypnotized by another person, despite contrary suggestions, and a complete detailed remembrance of what has happened may be restored in a later hypnotic sleep. I believe that the instinctive feeling of these facts on the part of the hypnotist is to a great extent responsible for the fact that so few crimes have hitherto been committed on hypnotized persons. Of course all those crimes that can be committed on a person in the waking state, are

*From Canadian Bar Review, Vol. XII, page 80.

²⁰ Forel, p. 278.

equally perpetrable on the hypnotic; with this qualification, that sleep may be induced in hypnosis, and we need hardly attempt to prove that a sleeping person may be more easily robbed, violated, or slain, than a person in the waking state.

The most common crime is that of a sexual nature, and these are the ones that have been mainly dealt with in literature. The case of the beggar Castellan in 1865, was very famous in France. Although physically a cripple and revolting to the girl Josephine H, she followed him for days, much against her will, and he outraged her on several occasions, also much against her will, although she didn't seem to be able to help herself. Castellan was condemned to 12 years' penal servitude. Moll seemed to give the right interpretation when he said that it was a case of rape committed on a hypnotic subject (p. 403); although I think that the girl was suffering from a sexual repression, and under the hypnotic influence to which Castellan subjected her, a transference of her sexual emotions to Castellan took place. The result of this was that her conscious will was unavailing to prevent her following the beggar. It doesn't matter whether we give a psychoanalytic interpretation of the facts; the truth was that with the aid of hypnotic influence on a very suggestible person, a sexual crime was repeatedly perpetrated on Josephine, in spite of what she herself, her friends, or her family could do.

We now come to a very important case of its kind, which occurred a few months ago in Ecuador. The victim was Angelita Blacio Flor, a beautiful sixteen year old society girl who relates how she was seized by a number of men and carried off to a hotel where a giant negro hypnotized her. Investigation revealed that the perpetrators of the crime carried her to a hotel of questionable repute, where they subjected her to violent sexual abuse, and then left her unconscious and in a serious condition in the street. The facts have not as yet been proved nor has the attitude of the court been shown. In any event we can place a certain reliance on the statements of the girl, and then we would have an example of a sexual crime perpetrated upon a subject in the hypnotic state. There is a great possibility that the offence was committed with the assistance of hypnotism; on the other hand, if the negro is not guilty of having used hypnotism it will be because the facts will be found to differ from those reported by the girl, and in which case nothing for or against the problem will have been proved. In any event it is true that rape has often been committed without the aid of hypnotism: its use would merely be an aid in the commission of the crime—as possibly in the above case to suggest amnesia of the perpetrators

of the crime (which is quite likely to have successful results) or, and this is less likely to be lasting, to suggest amnesia as to the incident. For our present discussion we are not so much concerned with the possibility of hypnotism being used to obtain consent from an otherwise unwilling person, as there was no suggestion of that in the report of Senorita Flor.

There are moreover, cases where, as a result of autosuggestion, a woman, believing the accusation to be true, accuses a person falsely of having committed a sexual offence on her (*e.g.*, the recent case of Sylvia Boyd in Oakville). Then there are cases where nothing of this kind happens. The woman invents the hypnosis, or at least the rape, simply to hide a *faux-pas*, or for some other reason. Certainly we must exercise a great deal of care before assuming that there is conscious lying on the part of the accuser in such cases. The confused notions of hypnosis and suggestion that are still so prevalent make it quite possible for a woman to mistake intense sexual excitement for hypnosis, and this appears all the more likely when we come to consider that sexual excitement, when artificially aroused, renders a girl quite as incapable of offering resistance as hypnosis.²¹ Of course, from the human point of view, we may be charitably inclined in these cases, but as experts we must really distinguish between them and hypnosis. Czynski's case tried at Munich in 1894 belongs here.²² He was charged with seducing Baroness X by means of post hypnotic suggestion, and also with taking part in a sham marriage ceremony. He was convicted on the latter but discharged on the former count. The opinions expressed by the experts were at great variance. Moll thought that hypnotism had little to do with the Baroness' love, while Schrenck-Notzing expressed himself thus:—"The jury acquitted the accused in respect to the charge of the offence against morality, possibly on account of the interpretation of the act, and possibly because the Baroness later yielded herself voluntarily to her seducer. But in spite of his, there can be no doubt about the crime of the accused, and therefore about the criminal use which he made of the hypnotic condition by means of intensive suggestions. In this instructive case, therefore, the decision of the hypnotic specialist will differ from that of the lawyer."²³

In a New York seduction case, evidence that the girl claimed to have been hypnotized by the defendant and not to have remem-

²¹ For the erotic root of hypnosis see Schilder, p. 34.

²² 14 Medico Legal Journal, 150; note in 40 L.R.A. 271.

²³ Forel, 297.

bered anything of the seduction until subsequent hypnotic examination, was held insufficient to get a verdict.²⁴

In *State v. Donovan*,²⁵ it was held that evidence of a seduction accomplished either by hypnotism or love-making, or both, was held sufficient to warrant a conviction.

Hollander and Kantor, writing in recent years, practically deny the moral dangers of hypnosis. Huffner believes that the subject carries out the suggestions only as far as he wants to. According to Vorkastner, there are only twenty cases of moral wrong done in hypnosis. On the other hand, Schrenck-Notzing (1920) thinks hypnotism can be used for criminal purposes; and although Friedlander (1922) considers it unfitted for most criminal purposes, he asserts that it can be used for sex offences. Schilder seems to agree with this when he says, "In general, we may go so far as to say that a subject may be more readily induced to perform sexual acts than other crimes."²⁶

It has also been asked whether suicide might not be committed as a result of hypnotism; on theoretical grounds, I agree with Professor Krafft-Ebing, of Vienna, that it would be possible, provided the suggestion were adroitly made. However, I think that it is a problem of the whole personality of the person and his conflicts at the time. There have been cases of double suicide, where a person would only commit suicide when bolstered up by the knowledge that another person was doing the same thing at the same time. It would seem to follow that if such a person had been hypnotized, it could have been effectively suggested to him that he commit suicide. It seems to me to be a relative problem. One person would commit suicide of his own accord; another would do so if it were consciously suggested to him, either by the moving pictures, the newspapers, or some other person; a third would do so only if a friend were to do so at the same time; but somewhere there would be a fourth, who could be brought to commit the act if it were suggested to him while he was in the hypnotic state. This is all the more understandable if at the same time it were suggested to him that he was acting of his own free will, and with certain definite motives. (Being amnesic of the suggestion given in hypnosis, his case would seem to be no different than if he were our first person, who thought there was good and sufficient reason to end his life.)

²⁴ *Austin v. Barker*, 1906, 110 App. Div. 510; 96 N.Y. Supp. 814.

²⁵ 1905, 128 Iowa 44.

²⁶ Schilder, 54.

There are important differences of opinion about the offences which hypnotic subjects may be made to commit. Liégeois and Liébault thought this danger very great, while Benedict and Ballet deny it altogether; others, Forel, Eulenberg, and Dalley, take an intermediate position. Liégeois conducted some experiments in this connection to see whether a crime could be successfully suggested, and he made a very suggestible girl fire a revolver, which she thought was loaded, at her mother; and another put arsenic in the drink of a relation. There have been many of these staged crimes, and they are usually criticised on the ground that the subject is aware of the general situation, and that he is conscious that an experiment is being made on him. It would seem, however, that only those acts are done which are in accord with a previous inclination of the subject.

Even so there appear to be two dangers. It is possible that suggestions be put so as to conceal the fact that they are of a criminal nature, and then there would be no reason to expect the moral feeling to revolt. A false premise could easily pervert the whole outlook and it might even appear to the subject that he was doing a meritorious act. Prof. Munsterberg allows that a man may swear falsely, though believing that he swears the truth, because someone has fabricated an artificial delusion in him.

The second danger arises from the fact that there are many acts which a person might be induced to do which are in no way criminal, as far as he is concerned, and yet which might have disastrous results. Thus Moll mentions cases of persons being induced hypnotically and post-hypnotically to sign promissory notes, deeds of gift, give large donations to charity, and to sign testamentary dispositions. Indirect extortion of money might be effected in this way, and a person might be cheated by being induced to pay the price of real pearls for sham articles, or he might be seriously crippled by buying, at a high price, a house which was useless to him. All that seems necessary is that the proper suggestion be offered so as to make the subject think that he is doing the act of his own accord at the time, and because there is sufficient justification.

There have been one or two cases where there has been a discussion of the question of a hypnotized person committing a murder. However, of all the crimes, murder is the least likely to be done in this way. One would really have to be a murderer to plan such a crime beforehand, and a suggestion such as this would be

rejected in advance.²⁷ Theft, however, has been successfully suggested, and in one case with far-reaching results. Liébault made a post-hypnotic suggestion of a theft to a young man, and as a result the man stole two statuettes. Two months later he was arrested for a number of petty thefts he had committed and which were recorded in his notebook. Liébault was inclined to think that these thefts were the result of his first criminal suggestion, but it was soon shown that his colleague had hypnotized the person and suggested all these thefts to him.²⁸

Even if suggesting that the general importance of suggestion in criminal cases does not appear very great, we must carefully distinguish between its general practical importance and its significance in any given case. For many reasons its general importance in this special connection seems slight; but it is quite another question whether hypnotic suggestion must not be taken into serious consideration in a concrete case in which, for instance, the accused person has not only been constantly hypnotized, but the hypnotizer is also known to derive considerable advantages from the crime.^{28a}

Although the general importance may be slight, the difficulty arises from the light thrown upon the intricacies of human nature by psychoanalysis, which, as we have already seen, allows us to say that the tendency to criminal activity is latent in all of us. More than this, psychoanalysis showed us that it is particularly in unconscious processes, such as dreams, that we give vent to these criminal instincts. It follows, therefore, that since hypnotism allows sway to the unconscious processes, we would be more liable to give vent to these same criminal instincts when in the hypnotic state. As I have already pointed out, it would be then quite easy to realise how a well-formed suggestion could hit one of our repressions to the effective point where we would follow that suggestion, even though it might be a crime of a lessor sort—and even though it might seem to be contrary to our personality as a whole. At this point I might be met by the argument that if a person committed a crime while under hypnotic influence, it would merely prove that that person was a criminal anyway. I think this argu-

²⁷ But see Marjoribanks "For the Defense," containing Marshall Hall's Interpretation of *The George Joseph Smith* murder case as resulting from hypnotism.

²⁸ Dercum—Rest, Mental Therapeutics and Suggestion.

^{28a} On February 14th, 1934, Judge Desort of the Chicago Superior Court issued an injunction forbidding Dr. Bossow to hypnotize his ex-wife. She claimed that he had hypnotized her into suing for divorce a year earlier and by means of this influence had also prevented her from seeking any alimony. She feared that he would make her cease her present action to re-open the divorce case and sought the injunction. This was granted and leave was also given to re-open the divorce case.

ment falls to the ground when we realise just how complex the psychic make-up that controls our personality is, and also when we realise how easy it might be for a person to be "unconsciously" out of accord with moral and legal principles at any one small point, and yet still be a model citizen.

Next we must speak of hypnotism as a defence, and the responsibility of the hypnotic criminal. Wagner-Jauregg, among others, mentions the possibility of a criminal causing himself to be hypnotized when already imbued with the intention of committing a crime, having the double purpose of overcoming his own inhibitions, as well as evading completely or in part, punishment in case he should be detected. Lilienthal thinks that in this case the hypnotic should be punished, and there is no doubt about this, because the well-settled principle of law that a person cannot take advantage of his own conduct would govern. At all events, however, strict enquiry should be made as to why the man consented to be hypnotized, unless this was done suddenly or by force or guile; for even if he was not aware of the experimenter's purpose, he incurs some liability for having voluntarily alienated his free will, so much more so if he knew for what criminal purpose it was proposed to employ him. Desjardins in France expressed the opinion that any person who commits a crime under the influence of criminal suggestion is punishable, because he might have foreseen the possibility of such a suggestion. Lilienthal, however, thinks it strange justice which would punish a crime committed in unconsciousness and without intention. It certainly would be contrary to the whole spirit of criminal law to punish a person for an act done while he was not in a state of responsibility and without intention.

Section 19 of the Canadian Criminal Code reads as follows:—"No person shall be convicted of an offence by reason of an act done or omitted by him when labouring under natural imbecility, or disease of the mind, to such an extent as to render him incapable of appreciating the nature and quality of the act or omission, and of knowing that such an act or omission was wrong." In all ordinary crimes the psychological element which is indispensable may be fairly accurately summed up as consisting simply in intending to do what you know to be criminal—but a person who committed a crime under hypnotic influence could possibly be protected if the depth of the hypnosis and the suggestibility of the subject satisfied the relative conditions of this section, which demand the exclusion of free volition or a morbid disturbance of the mental activity. Kenny says that generally a crime must be an

act of a man's will, and will is not a mere wish but an emotion of the mind always succeeded by motion. It is the power of volition. (*i.e.*, the offender must be able to help doing what he does. Where it is absent, an immunity from criminal punishment will consequently arise.²⁹) Dr. Mercier says:—"To incur responsibility by a harmful act, the actor must will the act, intend the harm done, and desire primarily his own gratification. Furthermore, the act must be unprovoked, and the actor must know and appreciate the circumstances in which it was done.³⁰ Applying this test to a hypnotic subject, if it were shown that the person was hypnotized; that he did not enter this state for the purpose of receiving a criminal suggestion; that the depth of the hypnosis was somnambulism; and that the suggestion was one that he could not under the circumstances resist, it would appear that the subject would not be guilty of a crime. As far as hypnotic influence is concerned, *Corpus Juris* states that:—"proof that the accused committed the offence charged when under the influence of hypnotism, so that he did not know what he was doing, or was compelled to commit the offence would no doubt be a defence."³¹

Another question to be considered concerns the responsibility of the person making the suggestion. By section 69 of the Canadian Criminal Code—"everyone is a party to and guilty of an offence who does or omits an act for the purpose of aiding any person to commit the offence, or counsels or procures any person to commit the offence." However before the Law was changed by this section, the problem would arise as to the responsibility of the hypnotized criminal, because if a hypnotized subject committed a crime and were not responsible, the operator would be liable as the agent; but if the subject were responsible for the crime, the operator would only be liable as instigator of the crime—in which case his punishment would be considerably mitigated. Under our present law, any person who orders a hypnotic who is still in a condition of responsibility to take anything away from a third party would, if the theft were carried out, be punishable as a party to the crime. Undoubtedly he would be such if the subject were declared not to be in a condition of responsibility.

In this connection of responsibility of hypnotist and subject let us look at the Sauter case. The prisoner was accused in Munich of having attempted to kill her husband by strewing gentian roots into his socks. This was, in her opinion, a means of killing; it had

²⁹ Outlines of Criminal Law, p. 40.

³⁰ Criminal Responsibility, p. 153.

³¹ 16 Cor. Jur. 111.

been advised to her by a fortune teller. (German law punishes attempts to commit crimes, although undertaken with inefficacious means). Being extremely superstitious, Frau Sauter had come to consult the fortune teller on every important occasion, and it was the latter who suggested the whole crime to Frau Sauter, although entirely unintentionally. The report which Forel gave led to the proof that the accused, fascinated by the fortune teller, had carried out the ideas of the latter while in a condition of suggestive dependence, and Frau Sauter was acquitted. This case represents the first acquittal of an accused person who committed a breach of the law under the suggestive influence of another person and is therefore of principal and lasting importance for the doctrine of the relationship of suggestion to Criminal Law.

The judging of the condition *in foro* becomes difficult if, as in the Sauter case, the intellectual originator, (the fortune teller) has absolutely no conception of the lawlessness of her actions, and of having committed a crime. We are therefore dealing with unintentional, unnoticed influencing. The court of Justice in this case was not in a position, under these circumstances, to punish either the originator or the person who has carried out the deed, since it is impossible to prove a criminal intention.³²

There is another direction in which hypnosis might be of importance in law—it can be used to falsify testimony. By means of retroactive hallucinations subjects can be made to believe, even after they awake, that they have witnessed certain scenes or perhaps even crimes. At any rate there is no theoretical bar to hypnosis being used for the purpose of obtaining false evidence.

However, it is difficult to conceive of a case where a deeply hypnotized person would prove a very valuable witness for the hypnotizer post-hypnotically in a court of law. And here also we must bear particularly in mind that some small detail might be easily omitted when the witness in receiving his instructions during hypnosis; and then the whole fabric would fall to pieces during the hearing in court. This would be all the more likely when we remember that cross-examination always confuses a hypnotic subject. But even if the direct importance of hypnotism in influencing testimony is not very great, hypnotism has acquired the very greatest significance as an indirect agent from this point of view. The retroactive hallucinations induced by hypnosis certainly led to the investigation of the question whether it is not possible to bring about falsification of memory without hypnosis, and Bernheim, who was first in the field, proved how easy it is to do so. In this way

³² Forel, 300.

people may be made to believe that they have witnessed certain episodes and thefts, for example, which only existed in their imagination as a result of suggestion to them.

This brings us to the case of Johann Berchthold. Since the mysterious uncertainty which attached to the murder was not cleared up immediately, a portion of the press of Munich began a kind of preliminary investigation. After several persons had brought forward matters relating to the occurrence, one journal declared, before the magistrates had completed their preliminary investigation, "that there was practically no doubt that Berchthold was the murderer." The result of this was that numerous persons offered themselves as witnesses, and gave evidence on oath, making statements which represented the most obvious contradictions. Whether one believes him guilty or innocent, the trial indisputably showed up the fact that part of the evidence was inspired by the newspapers. As a matter of fact, among two hundred and ten witnesses called there were eighteen whose evidence could be referred directly to the influence of the newspaper notices. One witness for instance swore that he saw the prisoner at a time when it was proved that he (the witness) was in court. Another witness swore he saw the prisoner wearing clothes that actually only existed in the imagination of the artist who drew a picture of the prisoner, and which was published in a newspaper, and so on.

In short, the result of this proceeding which is so very interesting for the doctrine of suggestion, teaches us that the authorities still lack a proper appreciation of the suggestive factor in law cases—that the number of persons who give evidence on oath in good faith untruthfully and inexactly is much greater than one generally supposes. Above all, it has brought new proof of the suggestive power of the press.

Bernheim pointed out long ago what precautions should be taken to prevent a Judge accepting evidence procured by suggestion. He proposed that witnesses should be tested as to their suggestibility, and that, too, by attempting—of course without hypnosis—to suggest an answer the inaccuracy of which could be easily demonstrated. If it should appear that a witness was readily susceptible to such suggestions, then the Judge should be very cautious in accepting his testimony. Similarly Professor Munsterberg³³ advises that not only should witnesses be examined as to their suggestibility with a view to ascertaining the influence of suggestion on their report of the facts, but also jurymen; as it is farce if not the evidence but insigni-

³³ "On the Witness Stand," p. 198.

ficant and accidental circumstances determine the attitude of the suggestible Juror.

Just as one can wring a confession out of a child, a woman, or a weak man, of a suspicious deed, so one can suddenly produce the suggestion in an innocent person that he is guilty. When this takes place, not only a complete confession to the crime, which he has not committed is made, but all sorts of details of the most concrete kind are hallucinated retroactively. In 1906 an English governess Miss Lake was murdered at Essen, and a man named Land confessed to the murder; in spite of the clear account he gave of the circumstances in which the crime was committed, he was acquitted by independent testimony. It was reported in the *Standard* of Dec. 18th, 1911, that it is now believed that Miss Lake was killed by a man living at Essen, who has since disappeared. This man made a special study of hypnotism and knew Land to be a good subject. It is thought that he suggested to Land the idea of passing himself off as the murderer.³⁴

Not only false confessions, but also false witnesses may be prepared in this manner. In the terrifying procedures which witnesses are frequently subjected to and in the manner in which they are turned and twisted by the barristers, they will certainly often be induced to make statements which depend on suggestion. The contradictions which one accuses them of are not always conscious lies and they are not seldom the results of suggestion.

The question whether hypnotism may be used to obtain from witnesses testimony which they decline to give in the waking state must be answered in the negative. It is only under certain conditions that people can be hypnotized against their will, and it is not probable that such favourable conditions would be present in the case of a witness who refused to give testimony. But apart from this, it is a mistake to suppose that a hypnotic subject straightway lets out his secrets; the hypnotized subject keeps his individuality and is silent on matters he does not choose to discuss.

I have no doubt that in some cases it would not only be justifiable but necessary to hypnotize a person in order to obtain his or her statement. It would be so for the purpose of saving an innocent person wrongly accused, and it would be necessary in order to revive the recollection in a case in which it was suspected that a person had been made a victim or instrument of a crime while in the trance state. As the law at present stands, there would be some legal difficulties in the way, although there is no specific law prohibiting

³⁴ Arnold—Psychology applied to Legal Evidence, 463.

it. Any confession or evidence given by a person in a hypnotic state would probably not be allowed in a court in Canada or the U.S.A. However such evidence would always be of use as an indication to the right conclusion so that the proof could be adduced from different sources.^{34a}

In the case of the *People v. Worthington*,³⁵ evidence showing that the defendant was told by her husband to kill the deceased and that she did so did not tend to prove that the defendant was hypnotized, and render admissible evidence of the effects of hypnotism on people subject to its influence. In a murder case, *The People v. Ebanks*,³⁶ testimony of an alleged hypnotist that the defendant while hypnotized denied his guilt was properly excluded. Searls said:—"The law of the United States does not recognise hypnotism. It would be an illegal offence. I cannot admit it." McFarland however said "what is said by Searls on the subject of hypnotism must be taken as applicable to the testimony offered on that subject in this case, which was clearly inadmissible and not as covering the whole subject. It will not be necessary to determine whether or not testimony tending to show that a defendant committed the act while in a hypnotic condition is admissible until a case involving that precise question shall be presented." However in *State v. Exum*,³⁷ the fact that the defendant had hypnotized his wife on at least three occasions was admissible as affecting her credibility. This tended to show that he had an influence over her to a greater extent than usually arises from the relationship between them. The Canadian case of *Rex v. Booher*,³⁸ was very interesting. In 1928 Booher was suspected of a murder, but the gun could not be found with which the crime had been committed. The crown then employed Dr. Langsner who claimed to be able to obtain information by means not used by the ordinary individual. The day following his first visit in the cell of the prisoner, Dr. Langsner went to the scene of the murder and

^{34a} There is now before the New York Courts the interesting case of the *People v. Elsie Smith*. The accused was indicted by a grand jury on the charge of murder of her eight month old son. At the preliminary hearing she testified that she had no recollection of the baby from November 7, 1933, when he was reported missing, until the baby was found in a swamp on November 26. The defence was insanity, and after a lunacy commission had disagreed as to her condition, Dr. Nathaniel Selby of the New York Neurological Institute was retained on February 1, 1934, to clarify the situation if possible, by hypnosis. The amnesia of Mrs. Smith was in part broken down by Dr. Selby's hypnotic experiment. She recalled certain incidents which she had not remembered previously. As a result, Mrs. Smith was found legally insane by the lunacy commission.

³⁵ (1894), 38 P.A.C. 689.

³⁶ (1897), 49 P.A.C. 1049.

³⁷ (1905), 50 S.E. 283.

³⁸ (1928), 50 C.C.C. 271.

after a few minutes search located the missing rifle. Dr. Langsner made subsequent visits to the defendant, but claimed he did not speak to him. On the last occasion of such a visit, he came out and told the detectives that they might expect a confession at any time. Within a few minutes Booher had confessed to the murder. In the opinion of the Judge who tried the case, the crown failed to discharge the onus he placed on it of establishing that the defendant was not under the influence of mental suggestion exercised by Langsner and therefore he did not allow the confession.

I am inclined to think that hypnotism of a kind, or some psychic power such as mental telepathy, was employed by Langsner, more particularly in learning the whereabouts of the gun. It is particularly here that hypnotism can be of service—not so much in obtaining the final confession, as in getting the proper clues that will eventually lead to a conviction through legally admissible means.³⁹

This completes our consideration of the bearing of hypnotism on jurisprudence. Cursorily we have seen the direct practical importance of hypnotism to jurisprudence, and also that it must not be exaggerated. It is not the fact that a hypnotic can be made the victim or the instrument of a crime; it is not the fact that we can induce retroactive suggestions hypnotically, and thereby falsify testimony, that is all important in this respect. But rather it is the number of instructive lessons in jurisprudence that hypnotism has directly supplied us with. By teaching us the importance of suggestion, it has opened up many a fresh field of view to the Science of Law. In the instigation of crime, factors that are very similar to those employed in hypnotic suggestions often play a part; indeed, it may be that suggestions in the waking state, as well as other mental influences are used.

All these are questions for the jurist to consider. He must be able to think psychologically and know how far an accused person's culpability may be lessened, if not nullified, by this suggestibility, and more especially by the ease with which he can be influenced. On the other hand, he must know how to weigh the value of evidence. Unfortunately our professional jurists are not sufficiently schooled in the psychological way of thinking. In future more will be demanded in this respect, since incapacity to think psychologically is calculated to make the jurist the agent of injustice, not of justice.

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³⁹ Compare the use of lie detectors which can furnish us leads, but not conclusive proof. See *Frye v. U.S.*, 1923, 54 App. Cas. D.C. 46. See also (1893), L.T. at 500. DeJong was hypnotized in Holland for purpose of obtaining clues as to whereabouts of missing girl whom he was alleged to have murdered.



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